No. 89-7260

In The

Supreme Court of the United States

October Term, 1990

WILLIAM J. BURNS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To the United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a judge may impose a sentence that departs from the applicable guideline range of the Sentencing Guidelines when the defendant has no notice of, nor any opportunity to comment upon, the intended departure and the factors on which it would be based.

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The opinion of the court of appeals, (J.A. 74-87), is reported at 893 F.2d 1343 (D.C. Cir. 1990). The judgment of the court of appeals, (J.A. 88), is unreported. The judgment of the district court, (J.A. 64-69), and its memorandum order, (J.A. 70-73), are unreported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1988). The judgment of the court of appeals was entered on January 12, 1990. A petition for rehearing with a suggestion for rehearing *en banc* was denied on March 15, 1990. As rehearing was timely sought below, under Rules 13.1 and 13.4 of this Court, the petition for certiorari was required to be filed within ninety days of the date that rehearing was denied, or by June 13, 1990. The petition was filed with this Court on April 19, 1990.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND GUIDELINES INVOLVED

The verbatim pertinent text of the following constitutional provision, statutes, guidelines, and rules is contained in the appendix to this brief:

1. U.S. Const. amend. V
2. 18 U.S.C. § 3553 (1988)
3. 18 U.S.C. § 3742 (1988)

4. Fed. R. Crim. P. 32 (1982)
5. Fed. R. Crim. P. 32 (1988)
6. United States Sentencing Commission, *Guidelines Manual*, ch. 1, pt. A.3 (1988)
7. United States Sentencing Commission, *Guidelines Manual*, ch. 1, pt. A.4(b) (1988)
8. United States Sentencing Commission, *Guidelines Manual*, § 1B1.1, *Commentary Application Notes*: 1(f) (1988)
9. United States Sentencing Commission, *Guidelines Manual*, § 2B1.1(b)(4), *Larceny, Embezzlement, and Other Forms of Theft* (1988)
10. United States Sentencing Commission, *Guidelines Manual*, § 2F1.1(b)(2)(A), *Fraud and Deceit* (1988)
11. United States Sentencing Commission, *Guidelines Manual*, § 2T1.1(b)(1), *Tax Evasion* (1988)
12. United States Sentencing Commission, *Guidelines Manual*, § 4A1.3, *Adequacy of History Category* (Policy Statement) (1988)
13. United States Sentencing Commission, *Guidelines Manual*, § 5K2.0, *Grounds for Departure* (Policy Statement) (1988)
14. United States Sentencing Commission, *Guidelines Manual*, § 6A1.3, *Resolution of Disputed Factors* (1988)

STATEMENT OF THE CASE

Petitioner, William J. Burns, challenges the district court's failure to provide notice of, and an opportunity to comment on, its intention to impose a sentence of incarceration well beyond that contemplated by the: 1) Federal Sentencing Guidelines ("Guidelines"); 2) plea agreement; and 3) presentence investigation report ("PSI report").

From 1967 to July 1988, Burns was employed by the United States Agency for International Development ("AID"). (J.A. 19). In 1982, as a supervisor in the agency's Financial Management Section, Burns was authorized to order the U.S. Treasury to make payments to vendors on the agency's behalf. (J.A. 13). From February 25, 1982 through May 26, 1988, he prepared false authorization forms for payments in the name of Vincent Kaufman and submitted the forms to the U.S. Treasury. (J.A. 13-14). The forms instructed the Treasury Department to draw a check on an account allocated to AID and send the check to the Signet Bank to be deposited in the name of Vincent Kaufman. (J.A. 13). The Kaufman account was under Burns' control, and he withdrew money from the account for his personal use. *Id.* Over the six-year period, the Treasury Department issued 53 such checks in response to Burns' fraudulent applications. *Id.* The amount stolen totals $1,261,184.92, and the outstanding tax obligation on this unreported income is $475,685. (J.A. 14).

In December 1987, AID officials conducted a routine background check required to maintain Burns' security clearance. (J.A. 13). They became suspicious upon learning that Burns' home was valued at over $400,000 despite his annual income of $35,108. *Id.* The officials then conducted a credit check and an investigation of pertinent bank records. *Id.* Those records and a subsequent internal investigation revealed Burns' diversion of money from the agency's travel fund. *Id.* After the investigation uncovered the fraud, Burns submitted two additional fraudulent forms to the U.S. Treasury, which, though

never paid, constituted false claims against the Government. (J.A. 75-76). Burns was arrested on July 12, 1988. (J.A. 1).

On August 11, 1988, Burns and the Government entered into an agreement whereby Burns agreed to waive indictment and plead guilty to one count of theft of government funds, 18 U.S.C. § 641, one count of false claims against the Government, 18 U.S.C. § 287, and one count of attempting to evade income tax, 26 U.S.C. § 7201. (J.A. 5-10). Burns also entered into a comprehensive restitution agreement, under which the Government will recover between $600,000 and $700,000 from him. (J.A. 20).[1] He agreed to surrender to the Government future earnings that exceed a specified amount until his debt is repaid, (J.A. 7), and was stripped of all claim to his retirement fund, (J.A. 42).

The plea agreement noted that all parties "understood" that the case would be covered by the Guidelines and that each party "assumed that a sentencing range of Level 19, Criminal History Category I," would determine

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[1] Burns also agreed to cooperate with the Government by submitting to debriefings regarding the money he obtained from the travel fund. (J.A. 6). Both Burns and his wife, Kathy Burns, agreed to make restitution by surrendering essentially all of their assets to the Government. (J.A. 6-8). Mrs. Burns was only permitted to retain the following items: 1) property and funds that she could establish were not acquired directly from her husband or obtained with funds acquired from him; 2) one automobile; 3) $10,000 in funds, less any property and funds retained because they were not acquired directly or indirectly from her husband; and 4) necessary household items, one wedding and engagement ring set, and wedding gifts. (J.A. 6-7).

the sentence. (J.A. 5-6). In the PSI report, the probation officer's sentencing calculations determined that this assumption was correct and that the applicable guideline range was 30 to 37 months.[2] (J.A. 16). The probation officer concluded that the case involved "no factors that would warrant departure from the guideline sentence." (J.A. 21). Both Burns and the attorney for the Government reviewed the PSI report, and neither filed any objections. (J.A. 32-33).

After according defense counsel, the attorney for the Government, and Burns their right to address the court, Judge Johnson imposed sentence. She agreed with the probation officer's calculation of the applicable sentence, stating that "[t]he guidelines which apply to this case do indeed reflect that the appropriate sentence is within the range of 30 to 37 months." (J.A. 52). However, the judge decided that "the appropriate sentence can only be effected if the court departs from the guidelines." *Id.* As

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[2] The base offense level for counts 1 and 2 was determined to be 17. (J.A. 14). This was increased two levels to 19 because Burns was a public servant who violated a trust and used a special skill in a manner to significantly facilitate the commission of the offense. (J.A. 15). The base offense level for Count 3 was 14, which was increased two levels to 16, because Burns failed to report more than $10,000 of income derived from criminal activity in any year. *Id.* The combined adjusted offense level was 21, which represented the higher of the two base levels (19), plus the total number of offense units (2). (J.A. 15). This number was reduced two levels because Burns accepted responsibility, resulting in a total offense level of 19. (J.A. 15-16). Based on a criminal history category of 1, the guideline imprisonment range was determined to be 30-37 months. (J.A. 16).

required by 18 U.S.C. § 3553(c)(2) (1988), Judge Johnson stated the reasons for the departure, finding that three factors were involved in the offense "which [she felt] the guidelines either fail to address or to consider adequately." (J.A. 53). Those factors, which the judge elaborated upon both at the hearing and in a memorandum order filed the same day, were: 1) "the Guidelines, in considering the severity of the offenses, do not sufficiently weigh the duration of [Burns'] criminal conduct," *id.*; 2) Burns "caused significant government disruption by stealing government funds in excess of one million dollars and by way of 53 separate fraudulent instruments," (J.A. 55); and 3) "[b]y continually evading the payment of . . . taxes, [Burns] conceal[ed] crimes of theft and false claims," *id.* Judge Johnson stated:

> For these reasons, I find that several important elements of the crimes committed by you are not adequately considered by the sentencing guidelines, thus warranting a departure from its prescription. This being the case, the court relies upon its own judgment and experience and finds that the guideline range for the offenses which you committed must be departed from.

Id. The judge then imposed a sentence of 60 months incarceration followed by three years of supervised release and 100 hours of community service per year for each of the three years of the supervised release. (J.A. 55-56). After noting that Burns had agreed to a restitution agreement with the Government, Judge Johnson informed him of his right to appeal and to appointed counsel, and then ordered him to step back with the marshal. (J.A. 57).

Burns' counsel then asked the court to consider delaying incarceration until the Bureau of Prisons designated the facility at which he would be incarcerated, but this request was denied. (J.A. 60). The hearing adjourned at 3:40 P.M., (J.A. 63), and that same day Judge Johnson filed a four and one-half page typewritten memorandum order explaining her determination to sentence Burns more severely than the Guidelines recommended. (J.A. 70-73).

Burns appealed the sentence to the United States Court of Appeals for the District of Columbia Circuit. (J.A. 1). The court of appeals rejected, *inter alia*, the claim that is presented here for review. Noting contrary conclusions in certain circuits, (J.A. 84), the court held that notice of the possibility of a departure is not contemplated by Fed. R. Crim. P. 32 ("Rule 32") and stated that "without a more specific command from Congress or the [Sentencing] Commission, we do not conclude that the process must include advance notice of the trial judge's decision to depart from the Guidelines." (J.A. 85).

A petition for rehearing and a suggestion for rehearing *en banc* were denied on March 15, 1990. (J.A. 89-90). This Court granted Burns' petition for certiorari on June 28, 1990. (J.A. 91).

SUMMARY OF ARGUMENT

Before imposing sentence, the court must grant both the defendant and his counsel the right to address the court. Rule 32(a)(1)(B), (C). Independent of these provisions, Rule 32(a)(1) also guarantees that both counsel for

the defendant and the attorney for the Government shall have the "opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence" before sentence is imposed under the Guidelines. Implicit in the right to comment provided by Rule 32(a)(1) is the right to notice that a judge, acting *sua sponte*, intends to depart from the Guidelines. Absent such notice, the right to comment on a matter critical to the sentencing process is defeated.

A. The power to depart from the guideline range for sentencing, though discretionary, is limited by statute to situations where the Guidelines do not adequately consider an aggravating or mitigating circumstance. 18 U.S.C. § 3553(b) (1988). Ordinarily, either the PSI report or the attorney for the Government will indicate that departure may be appropriate. The defendant will then be assured of notice of the potential for departure and will have an opportunity to comment before the imposition of sentence. Rule 32(c)(3)(A). Only in the situation presented here, where departure is suggested solely by the judge, does notice become an issue. Given that the grounds for departure from the applicable sentencing range are not readily discernible, counsel for the parties must be given prior notice of the judge's intent to depart to be able to challenge the accuracy of the factors used and the "propriety of their use for departure." *United States v. Kim*, 896 F.2d 678, 681 (2d Cir. 1990). Without notice, counsel cannot reasonably be expected to anticipate and prepare arguments against departure.

A notice requirement in this context is consistent with the congressional goals to make criminal sentencing fairer and more certain. Rule 32 and other sentencing

rules and guidelines reflect a clear preference for informed participation by the parties during the sentencing process. For example, Rule 32(c)(3)(A) ensures that the parties are cognizant of the probation officer's assessment of the relevant sentencing factors and allows the parties to challenge the facts and conclusions contained in the PSI report. It would be inconsistent to give the parties notice and allow comment on the propriety of a departure recommendation contained in the PSI report but not to give them notice and an opportunity to comment when the judge intends to depart. In sum, whether the court analyzes the plain language of Rule 32 or reviews the rule in the broader context of guideline sentencing, notice of the judge's intent to depart *sua sponte* is required.

B. Even if Rule 32(a)(1) cannot be read to require notice of the judge's decision to depart, the right to notice should be accorded as a matter of procedural due process. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality) ("it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause"). When the *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test is applied to evaluate whether due process requires notice in this case, it is clear that the interest in fair and accurate sentencing can only be effectuated if the judge provides notice of the intent to depart from the Guidelines. Further, giving notice will place no significant added burden on the court or the Government.

C. The court of appeals determined that Burns was not prejudiced by the lack of notice for the following reasons: 1) "[a]ll of the facts that formed the basis of

Judge Johnson's decision were contained in the presentencing report"; 2) Burns "had an opportunity to address the court before sentencing during his allocution"; and 3) Burns had the right to appeal his sentence. (J.A. 84-85). None of these points are valid.

First, to the extent the facts supporting the judge's departure decision can be gleaned from the PSI report, they are present in entirely different contexts in a report that ultimately states there are *no* grounds for departure. (J.A. 21). If anything, the PSI report eliminated any concern about departure. Second, though Burns and his counsel addressed the court, neither addressed any proposed basis for departure. The harm resulting from counsel's inability to make arguments addressing the court's grounds for departure was not mitigated because counsel addressed other matters. Finally, a right to appeal from a discretionary decision is a poor substitute for the right to influence the decision before it is made.

ARGUMENT

I. PRIOR TO HEARING FINAL COMMENTS FROM THE PARTIES AND IMPOSING SENTENCE, A DISTRICT COURT MUST GIVE NOTICE IF IT IS CONSIDERING DEPARTURE FROM THE SENTENCING GUIDELINES WHERE DEPARTURE HAS NOT BEEN RAISED BY THE PARTIES OR BY THE PRESENTENCE INVESTIGATION REPORT

With the adoption of the Guidelines, Rule 32(a)(1) was amended to require the district court to allow both parties an opportunity to comment on the probation officer's determinations and "on other matters relating to the

appropriate sentence" before sentence is imposed.[3] In this case, Burns and his counsel were given an opportunity to address the court, but they had no notice that the judge disagreed with the PSI report conclusion that there was no basis for departure from the 30-37 month guideline range. Unbeknownst to counsel, the court was considering three specific grounds for imposing a more severe sentence than the Guidelines contemplated, and counsel's comments did not address the court's concerns. (J.A. 39-48). Only after the parties concluded their comments did the judge reveal her assessment of the case and impose her sentence of 60 months imprisonment. (J.A. 49-56). The failure of the court to give notice before hearing final comments, when it had rejected the findings in the PSI report and was considering an upward departure from the Guidelines, violated petitioner's rights under Rule 32(a)(1) and deprived him of due process of law under the fifth amendment to the United States Constitution.

A. Because Rule 32(a)(1) guarantees the right to comment on matters relating to the appropriate sentence, the district court must give the parties notice before it imposes sentence if it is considering a sentence outside the Guidelines based on reasons not identified by the parties or the PSI report as possible grounds for departure

The court of appeals below is the only circuit court that has held that the right to comment articulated in

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[3] This right is separate from the more comprehensive right of defense counsel to address the court, Rule 32(a)(1)(B), and the defendant's right of allocution, Rule 32(a)(1)(C).

Rule 32(a)(1) does not include the right to notice if the sentencing judge is considering a departure from the Guidelines.[4] (J.A. 84-85). The court's construction

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[4] Every other court of appeals decidin; this issue has concluded that the language of Rule 32(a)(1) requires reasonable notice, before counsel's comments are concluded, if the judge is considering an upward departure from the guideline range and departure has not been suggested in the PSI report. *United States v. Sands*, No. 89-5475 (8th Cir. July 10, 1990) (1990 U.S. App. LEXIS 11565) (where the PSI report contained no facts supporting departure and stated that no factors existed that warranted departure, defendant was improperly denied notice of facts on which departure was based and an opportunity to rebut those facts); *United States v. Landry*, 903 F.2d 334, 340 (5th Cir. 1990) (involvement of a minor in drug trafficking as a basis for upward departure was not raised in the PSI report or by the parties as a basis for departure, therefore, defendant was denied the opportunity to address the court on that issue); *United States v. Hedberg*, 902 F.2d 1427, 1428-29 (9th Cir. 1990) (PSI report did not mention possible departure based on vulnerable victim adjustment and judge did not inform defendant of possible departure prior to sentencing); *United States v. Williams*, 901 F.2d 1394, 1401 (7th Cir. 1990) (if sentencing court relies on factors not raised in PSI report, court must highlight those factors and allow defense counsel an opportunity to address them before sentence is imposed); *United States v. Anders*, 899 F.2d 570, 576-77 (6th Cir. 1990) (sentence affirmed because PSI report provided defendant with notice that departure might be warranted on several specified grounds); *United States v. Hernandez*, 896 F.2d 642, 644 (1st Cir. 1990) ("a criminal defendant must have notice of any facts that will affect his sentence and meaningful opportunity to respond"); *United States v. Palta*, 880 F.2d 636, 640 (2d Cir. 1989) ("Adequate notice and the opportunity to contest an upward departure from the guidelines are indispensable to sentencing uniformity and fairness."); *United States v. Cervantes*, 878 F.2d 50, 56 (2d Cir. 1989) (noting that the rationale underlying

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unjustifiably narrows the right to comment mandated by Rule 32(a)(1), limiting it in a way that is inconsistent with the rule's plain meaning and at odds with the overall scheme of the Guidelines and related statutes and rules.[5]

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notice and comment requirements of Rule 32 "also applies to the grounds for an upward departure, especially where the judge relies upon factors not addressed in the presentence report or which, if mentioned, have been recast by the judge"); *United States v. Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989) (basis for departure must be identified as such in the PSI report or the court must advise the defendant "that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment") (footnote omitted); *United States v. Otero*, 868 F.2d 1412, 1415 (5th Cir. 1989) (judge did not comply with Rule 32(a)(1) comment requirement when the purity of cocaine as a basis for upward departure was first mentioned when sentence was imposed).

[5] Congress provided no legislative history explaining why Rule 32(a)(1) was amended in 1984 to include the language: "At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Whether notice is required, therefore, must be determined by 1) the plain language of the provision, and 2) the underlying policies of fairness and accurate sentencing that inspired the Guidelines. *See Hallstrom v. Tillamook County*, 110 S. Ct. 304, 308 (1989) ("[t]he starting point for interpreting a statute is the language of the statute itself"); *United States v. Rutherford*, 442 U.S. 544, 552 (1979) (exceptions to clearly delineated statutes will be implied to prevent "consequences obviously at variance with the policy of the enactment as a whole"); *see also* 2A N. Singer, *Sutherland Statutory Construction* §§ 44.01, 46.05, 58.06 (Sands 4th ed. 1984).

While the language of Rule 32(a)(1) does not expressly state that notice is required, the amended provision allowing an "opportunity to comment" on the appropriate sentence must be read to require the judge to provide advance notice of an unanticipated upward departure so that the parties can exercise the right to comment. In amending Rule 32(a)(1), Congress recognized that counsel specifically needed an opportunity to comment on matters relating to the appropriate sentence apart from counsel's general right to address the court and the defendant's right of allocution. A comparison of the rule's language prior to and after its amendment reflects Congress' intent to provide the parties with an opportunity to comment specifically on matters relevant to sentencing under the Guidelines. Prior to its amendment, Rule 32(a)(1) simply stated that "[s]entence shall be imposed without unreasonable delay" and provided for counsel's and the defendant's right to address the court. Fed. R. Crim. P. 32(a)(1) (1982). In contrast, amended Rule 32(a)(1) requires, among other things, that the judge provide both parties with notice "of the sentencing classifications and sentencing guideline range believed to be applicable to the case" and with "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." In language similar to that contained in the prior version, the rule also provides that counsel and the defendant have a right to address the court generally.

The new "comment" language in amended Rule 32(a)(1) must provide the parties with the right to comment on the appropriate sentence under the Guidelines; otherwise, the language would be rendered superfluous

because counsel and the defendant already have the right to address the court generally at sentencing. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (declining to adopt a strained reading of a statute "which renders one part a mere redundancy"); 2A N. Singer, *Sutherland Statutory Construction*, § 46.06, at 104 (Sands 4th ed. 1984) ("statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"). Because the judge's intention to depart from the applicable guideline range is a "matter[] relating to the appropriate sentence," the notice and comment requirements of Rule 32(a)(1) encompass notice of, and an opportunity to comment on, departure.

Disclosure of the judge's intention to depart from the applicable guideline range also is consistent with notice requirements in other provisions of Rule 32. Subdivision (c)(3)(A) ensures that the parties are cognizant of the probation officer's assessment of relevant sentencing factors well in advance of the hearing and also allows the parties to challenge the conclusions and the facts contained in the PSI report, including any recommendations for a departure from the Guidelines. The policy that guides the rule is that disclosure of relevant information before imposition of sentence is essential. There is no reason to conclude that this policy was not intended to apply when the judge recognizes potential grounds for departure that were not identified in the PSI report.[6]

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[6] Even when the parties or the PSI report specifically state grounds for departure, the court should give notice that it is

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Further, when Rule 32 is read in the context of the policy underlying the Guidelines, the need for notice is clear. Prior to the adoption of the Guidelines, sentencing was largely an exercise of broad judicial discretion. Congress enacted the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984), to "structure judicial sentencing discretion, eliminate indeterminate sentencing . . . and make criminal sentencing fairer and more certain." S. Rep. No. 225, 98th Cong., 2d Sess. 65, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3248.[7] The goals of fairness and certainty can be better

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considering a departure from the Guidelines because notice can only help focus the discussion at the sentencing hearing. Nevertheless, where the parties are on notice from the PSI report or from each other that a departure is being considered, the need for the judge to disclose that he or she is contemplating a departure is less critical and may not constitute reversible error. *Anders*, 899 F.2d at 576-77; *United States v. Ramirez Acosta*, 895 F.2d 597, 601 (9th Cir. 1990).

[7] The Sentencing Commission promulgated Guidelines that establish base offense levels with upward or downward adjustments based on the presence or absence of several specified factors. *See* U.S.S.G., ch. 2 (Offense Conduct); U.S.S.G., ch. 3 (Adjustments). The resulting calculation establishes a sentencing range for the offense. U.S.S.G., ch. 5 (Determining the Sentence). To promote consistency in sentences, the sentencing judge may depart from the applicable sentence range only when he or she finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988). The sentencing judge must perform a fairly complex analysis to determine

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served by informed comment by the parties,[8] made after proper notice of the factors that are relevant to sentencing.

Moreover, requiring notice under Rule 32(a)(1) follows from the highly structured review process mandated by the Guidelines. The guideline sentencing scheme requires significant informed participation by the parties and a U.S. probation officer. The probation officer compiles the PSI report that, among many other things, must ascertain the appropriate guideline range for the offenses and explain "any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances." Rule 32(c)(2)(B).

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whether a circumstance was adequately taken into consideration and must "consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.*

[8] A Rule 32(a)(1) notice requirement would apply to both the defense and the Government. The Government is also disadvantaged by departure without notice because it is then denied the opportunity to comment on the factors identified by the judge to justify downward departure, such as cooperation with the Government or calculation of the defendant's criminal history. The Government itself recently appealed an unannounced downward departure, raising arguments similar to those that petitioner raises here. *United States v. Goff*, No. 89-5656, slip op. at 6, n.4 (4th Cir. July 6, 1990) (1990 LEXIS U.S. App. 11422) (raising the argument that "failure of the district court to give the government notice of and an opportunity to comment on this departure basis before imposing sentence violates Federal Rule of Criminal Procedure 32(a)(1)").

Following compilation of the PSI report, the court must provide both parties with "notice of the probation officer's determination . . . of the sentencing classifications and sentencing guideline range believed to be applicable to the case."[9] Rule 32(a)(1). If the defendant then alleges any factual inaccuracies in the PSI report, the court must conduct an appropriate review, taking testimony if needed, and make findings unless the court concludes that no resolution of the dispute is necessary because the disputed matter will not affect sentencing. Rule 32(c)(3)(A), (D). The court must determine that the defendant and defendant's counsel have had an opportunity to read and discuss the PSI report and then must entertain comments from the defendant, defendant's counsel, and the attorney for the Government regarding the appropriate sentence. Rule 32(a)(1)(A), (B), (C).

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[9] This step is subject to several variables. In most circumstances the court must provide defendant's counsel with a copy of the PSI report, including the probation officer's calculation of the guideline classification of the offense, at least ten days (unless waived) before sentence is imposed. Rule 32(c)(3)(A). This disclosure should not include: 1) final recommendations of the probation officer; 2) diagnostic opinions where disclosure might seriously disrupt a program of rehabilitation; 3) information that, if disclosed, would breach a promise of confidentiality; or 4) any information which, if disclosed, could be harmful to the defendant or others. *Id.* If the court withholds all or part of the PSI report under Rule 32(c)(3)(A), it must: "state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon." Rule 32(c)(3)(B).

The right to comment on "other matters relating to the appropriate sentence" can only be harmonized with these other provisions of the rule if it includes a right to notice when the court considers departure based on a factor that has not been identified as relevant by the parties or the PSI report. Under the structure now required for sentencing, the parties should not be expected to guess whether the judge is contemplating a departure from the Guidelines. Rather, relevant factors must be disclosed and discussed before the judge decides the appropriate sentence.

Notice is also warranted because of the complexity of the departure decision. The parties cannot be expected to routinely hypothesize every conceivable basis for a departure, conduct research and construct appropriate arguments, and then decide whether or not it is strategically sound to mention departure.[10] Without notice, the parties will not be able to challenge the accuracy of factors used by the judge or to challenge the "propriety of

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[10] There are two types of departures from the Guidelines. The first type is commonly known as "Commission-identified" departures because they are listed in the commentary accompanying specific Guidelines and in policy statements. *See, e.g.*, U.S.S.G. §§ 4A1.3, 5K2.0. The second type, known as "judicially-created" departures, involves aggravating and mitigating circumstances not specifically identified by the Commission as potential bases for departure, but which the sentencing court determines justify departure. *United States v. Summers*, 893 F.2d 63, 67 (4th Cir. 1990). The Sentencing Commission anticipated that "judicially-created" departures would be "highly unusual." U.S.S.G., ch. 1, pt. A.4(b).

their use for a departure." *United States v. Kim*, 896 F.2d 678, 681 (2d Cir. 1990).[11]

The court of appeals below concluded that requiring district courts to give this type of notice to defendants would constitute a "radical deviation" from pre-guidelines practice, (J.A. 84), which it would not do without clear direction from Congress or the U.S. Sentencing Commission ("Sentencing Commission"). (J.A. 85). This observation overlooks the fact that 1) the Sentencing Commission has provided guidance on this issue, and 2) post-guideline practice is intended to be more formalized than pre-guideline practice:

> In current practice, factors relevant to sentencing are often determined in an informal fashion. . . . This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. *More formality is therefore unavoidable if the sentencing process is to be accurate and fair.* . . . When a reasonable dispute exists about *any* factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information.

[11] Similarly, this Court has held in another context that a notice requirement may be implicit when a right would be meaningless without notice. *Oyler v. Boles*, 368 U.S. 448, 452 (1962) ("[I]t would [be] an idle accomplishment to say that due process requires counsel [at a habitual offender proceeding] but not the right to reasonable notice and opportunity to be heard.").

U.S.S.G. § 6A1.3, commentary (emphasis added).[12] Part of this new "formality" must include a meaningful opportunity for the defendant to challenge an upward departure.

Thus, whether the Court analyzes the plain language of the rule or reviews it in the broader context of guideline sentencing, Congress expected that counsel would be afforded an opportunity to comment on matters relevant to the appropriate sentence. That expectation is defeated when the court withholds notice that it intends to depart *sua sponte* from the applicable guideline range.

B. Notice that the court is considering an upward departure is required as a matter of fundamental procedural due process

If Rule 32(a)(1) does not by its own terms require notice of an impending upward departure, such notice must be afforded as a matter of procedural due process of law. Fifth amendment guarantees of due process govern sentencing proceedings. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality) ("it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause"); *United States v. Rone*, 743 F.2d 1169, 1171 (7th Cir. 1984)

[12] The district court departed from the Guidelines because it found "at least three factors involved in the defendant's offenses which the Guidelines either fail to address or to consider adequately." (J.A. 71). As neither the parties nor the PSI report concluded that these factors were present, their existence was reasonably in dispute, albeit the dispute was not known to the parties.

("[c]onvicted defendants, including those who plead guilty, have a due process right to a fair sentencing procedure").

This Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), fashioned a three-part test that evaluates whether a given procedure satisfies the due process requirements. The *Mathews* test serves to balance the "governmental and private interests that are affected" by the procedure in question. *Id.* at 334. The three factors are:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.[13]

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[13] Although *Mathews* addressed administrative termination of Social Security benefits, the *Mathews* analysis for due process sufficiency has been used to review sentencing procedures. *E.g., United States v. Sanchez*, Nos. 89-50427, 89-50428, 89-50433, slip op. at 3 (9th Cir. July 17, 1990) (1990 LEXIS U.S. App. 12026) (sentencing under Guidelines satisfies *Mathews* test, provided defendant receives notice of intended upward departure and opportunity for comment); *United States v. Pugliese*, 805 F.2d 1117, 1122-23 (2d Cir. 1986) (applying *Mathews* test in reviewing sentencing judge's reliance on transcript of separate proceeding before other judge). *But see United States v. Ramirez-De Rosas*, 873 F.2d 1177, 1179 (9th Cir. 1989) (declining to apply *Mathews* outside the context of an administrative proceeding).

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Applying the first *Mathews* factor, "it is clear that [the defendant's] interest in sentencing could not be stronger because his future liberty will be determined by the sentence imposed." *United States v. Romano*, 825 F.2d 725, 729 (2d Cir. 1987); *see also United States v. Pugliese*, 805 F.2d 1117, 1122 (2d Cir. 1986) ("interest of an offender at sentencing could not be greater"). Here, the judge's decision to depart imposed on Burns an additional 23 to 29 months in prison. (J.A. 52-56).

Second, notice that a sentencing judge is contemplating an upward departure will alert counsel to the need to present any available challenges. *United States v. Kim*, 896 F.2d 678, 681 (2d Cir. 1990). Thus, a requirement for notice and an opportunity to comment will reduce the risk that the judge will overlook a compelling argument that departure from the Guidelines is unnecessary or even erroneous.

The sentencing judge enjoys a certain amount of discretion in determining which factors warrant an upward

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Nothing in the *Mathews* factors applies uniquely to administrative actions. Rather, the *Mathews* test sets forth a generic, interest-based analysis applicable to a variety of contexts. *See, e.g., United States v. Raddatz*, 447 U.S. 667, 677 (1980) (applying *Mathews* test to statutory provision allowing federal court to accept magistrate's assessment of credibility of testimony in ruling on suppression of evidence in criminal case); *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979) (citing *Mathews* and noting in review of parole denial that "the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error").

departure from a guidelines sentence. The need for accuracy in a discretionary proceeding demands that there be an "informed exercise of discretion" which is best effectuated when the affected party has notice of the adverse action and a full opportunity to comment. *See Black v. Romano*, 471 U.S. 606, 612 (1985) (due process entitles parolee or probationer, in revocation hearing, not only to refute alleged violations, but to present mitigating excuses or reasoning that revocation is inappropriate under the circumstances). Even when the facts of a case are undisputed, accurate interpretation of those facts can only be fully realized if the defendant is afforded an opportunity to challenge their weight and significance.[14] When a judge avails himself of the affected individual's interpretation of the facts bearing on sentencing, "his discretion will be more informed and . . . the risk of error substantially reduced." *Goss v. Lopez*, 419 U.S. 565, 584 (1975). The subjective quality of sentencing and the opportunity for error, even under the Guidelines, is amply demonstrated here, where the sentencing judge

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[14] *See Goss v. Lopez*, 419 U.S. 565, 584 (1975) (requiring an informal hearing prior to disciplinary action or as soon as practicable by school officials because even when the disciplinarian is certain of the bare facts, "things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context"); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (discussing need for hearing prior to discharge of school district employees because "[e]ven where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect").

disregarded the statement in the PSI report that no factors warranted an upward departure. (J.A. 21). The judge's sentencing decision, however, may have been different if Burns had been able to address specific factors influencing the judge's departure decision. Without notice of the judge's intent to depart and the opportunity to respond, Burns was foreclosed from presenting his views and further informing the judge's decision.[15] Denial of notice has placed Burns at substantial risk of an erroneous deprivation of his liberty interest.

Review of the third *Mathews* prong demonstrates that notice of a guidelines departure would not burden the governmental interest at sentencing. Notice would enable the sentencing judge to hear arguments regarding specific factors on which a departure decision might be based. The resultant increase in accuracy would promote the Government's interest in sentence uniformity and proportionality. *See* U.S.S.G., ch. 1, pt. A.3. (Congress sought to balance "uniformity" and "proportionality" of sentencing in adopting Guidelines).

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[15] The court of appeals below acknowledged the significance of timely notice of departure to the petitioner's ability to effectively advocate his position. (J.A. 85) ("the defendant might have made a stronger argument for himself if he had known that the judge was intending to depart from the Guidelines and the reasons for such a departure"). However, the court failed to recognize the essential connection between such notice and the procedures mandated by due process concerns. It is this type of opportunity to make the strongest argument possible for oneself, in the face of adverse governmental action, that is at the core of due process protection.

There is no fiscal burden associated with the notice that Burns seeks.[16] Requiring notice to accompany the right to comment in Rule 32(a)(1) would not substantially increase the burden already required under the highly structured review process mandated by the Guidelines.[17] A formal procedure for providing notice with an opportunity to comment under Rule 32(a)(1) when a judge

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[16] When analyzing the fiscal burden of a particular practice, the courts have focused on whether due process required provision of a hearing which did not previously exist. *Washington v. Harper*, 110 S. Ct. 1028, 1042 (1990) (requirement for judicial hearings prior to involuntary psychiatric treatment of inmates was unwarranted under due process clause, in part because the hearings would "divert scarce prison resources, both money and the staff's time"); *Romano*, 825 F.2d at 729-30 (request for separate hearing on sentencing information denied because "advantages to be gained from the procedures [were] far outweighed by the fiscal and administrative burdens faced by the government in implementing them"). The extent to which an additional hearing would be necessitated by a notice requirement is very limited. Normally, the sentencing judge would give notice of an intended departure prior to the sentencing hearing contemplated by the Guidelines. Where notice is given at the hearing, there is a risk that a postponement may be necessary but the Guidelines anticipate that some need for postponement may arise. Rule 32(a)(1).

[17] The possibility of an upward departure is not likely to materialize at the last minute. By statute, the judge is required to state the reasons for the departure on the record when sentence is imposed. 18 U.S.C. § 3553(c) (1988). That decision is reviewable on appeal. 18 U.S.C. § 3742(e). Here, it is fairly clear from the record that the judge had considered an upward departure prior to the sentencing hearing. The sentencing hearing was adjourned at 3:40 p.m. and a four and one-half page typewritten memorandum order containing the departure analysis was filed the same day.

intends to depart upward without a recommendation for departure from the PSI report or the Government is consistent with guideline sentencing. It is no more cumbersome than the formal procedure required when the PSI report recommends upward departure. Rule 32(c)(3)(A). The need for additional proceedings is highly unlikely, particularly if the judge gives notice of the intent to depart in advance of the scheduled sentencing hearing.

Ensuring that a defendant is aware of the judge's intent to impose an upward departure and has adequate opportunity to comment on the grounds for departure is not contrary to the Government's interest, nor will it impose significant burdens on the court. Prosecutors, who would themselves be placed on notice of the sentencing judge's concerns, would be able to more effectively argue the Government's position with respect to a departure from the Guidelines. Increased notice may in fact lower costs by facilitating dispute resolution at the trial level, thus eliminating, or at least reducing in scope, some sentence appeals. In sum, the application of *Mathews* to guideline sentencing compels a finding that, if not by statute or rule, as a matter of due process, petitioner was entitled to notice and an opportunity to address the judge's inclination to depart. Because the judge failed to give that notice, Burns is entitled to be resentenced.

II. PETITIONER WAS PREJUDICED BY THE DISTRICT COURT'S FAILURE TO PROVIDE NOTICE THAT IT INTENDED TO DEPART FROM THE APPLICABLE GUIDELINE SENTENCING RANGE

After concluding that there was no right to notice of an upward departure from the Guidelines, the court of

appeals determined that Burns was not prejudiced by the lack of notice because: 1) "[a]ll of the facts that formed the basis of Judge Johnson's decision were contained in the presentencing report"; 2) Burns "had an opportunity to address the court before sentencing during his allocution"; and 3) Burns had the right to appeal his sentence. (J.A. 84-85). The conclusion that Burns was not harmed by the lack of notice is untenable for the reasons set forth below.

First, the mere presence of the facts relied on for departure somewhere in the PSI report does not provide notice that a departure is being considered. As the Ninth Circuit stated in *United States v. Nuno-Para*:

> the presentence report or the court must inform the defendant of factors that they consider to constitute grounds for departure. This requirement is not satisfied by the fact that the relevant information is present within the presentence report. Rather, such information either must be identified as a basis for departure in the presentence report, or, the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment.

877 F.2d 1409, 1415 (9th Cir. 1989) (citations omitted).[18] While the PSI report in this case contained some mention

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[18] Several other cases hold that it is inappropriate for the sentencing judge to depart from the Guidelines, without notice, based upon facts contained in the PSI report, but not identified therein as a ground for departure. *United States v. Landry*, 903 F.2d 334, 340 (5th Cir. 1990); *United States v. Hedberg*, 902 F.2d 1427, 1429 (9th Cir. 1990); *United States v. Otero*,

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of facts that led to the judge's conclusion that a substantial departure was called for,[19] these facts were mentioned in far different contexts, and the PSI report specifically stated that "[t]here are no factors that would warrant departure from the guideline sentence." (J.A. 21). In short, if the PSI report did contain the raw information

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868 F.2d 1412, 1415 (5th Cir. 1989); *see also United States v. Williams*, 901 F.2d 1394, 1400 (7th Cir. 1990) ("Courts have interpreted the rule to require that the grounds for departure must either be identified in the presentence report, *or* by the sentencing court at the defendant's sentencing hearing.") (emphasis in original); *United States v. Cervantes*, 878 F.2d 50, 56 (2d Cir. 1989) ("To the extent the court . . . relied upon matters not mentioned in the report, or not highlighted in a fashion that would clearly convey their significance to defense counsel, [the court] compounded the problem.").

[19] The PSI report made reference to the duration of the criminal conduct, but not in the context of departure. Nor was concealment mentioned in the context of departure, although the report did recommend an increase of two levels from the base offense level because Burns failed to report income exceeding $10,000. (J.A. 15). The report made no finding whatever of any disruption of a governmental function at AID. The only discussion of government operations in the report was:

> Mr. Burns . . . would issue a false claim (Form 1034) in the name of Vincent Kaufman. . . . The false form was prepared by a clerk and subsequently approved by the defendant. The voucher would then be sent to the U.S. Treasury Department for payment to Vincent Kaufman. The payment checks were then sent directly to the account of Vincent Kaufman . . . . The Government has determined that 53 fraudulent checks were issued and the total amount of the theft was $1,261,184.92.

(J.A. 13).

upon which departure was based, it certainly did not alert the parties that the judge was considering departure; if anything, it dispelled any notion that departure would be considered.

Second, the court of appeals' conclusion that Burns had an opportunity to address the district judge prior to sentencing underestimates the significance of the fact that Burns was unable to address the specific factors that formed the basis for the upward departure. The court of appeals failed to recognize that an attorney will be unlikely to address technical arguments regarding the propriety of departure unless notified that the judge is considering departure. As the Second Circuit stated in *United States v. Kim*:

> Though counsel always can be expected to urge leniency in addressing a district judge at sentencing, under the Guidelines system his argument will normally be cast quite differently depending on whether the judge has indicated that an upward departure is contemplated. Without such indication, counsel will focus on those aspects of the case that merit leniency, arguing for a sentence at the low end of the applicable guideline range, or, if unusual mitigating factors are present, urging a downward departure. Faced with the prospect of an upward departure, however, counsel must focus on the technical issues of whether an upward departure is permissible under the statutory standard, whether a departure, if made, will be pursuant to part 4A or part 5K of the Guidelines, and whether anything in the Guidelines precludes such a departure . . . . Counsel will also be concerned with appealing more generally to the judge's discretion not to make an upward departure or to make at most only a slight departure.

896 F.2d 678, 681 (2d Cir. 1990) (citations omitted). Burns' complaint is not, as the court of appeals below stated, just a lost chance to make a stronger argument, (J.A. 85), although even that finding itself suggests that Burns was prejudiced by the lack of notice. Rather, as the Second Circuit recognized in *Kim*, the opportunity to address the court in a meaningful manner can only take place if there is notice that the court is considering an upward departure. Without that notice, defense counsel's argument to the court was the predictable call for leniency with no discussion of the critical and technical issues relevant to upward departure. (J.A. 40-45).[20]

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[20] For example, arguments that almost certainly would have been presented to the sentencing court if notice had been given include: 1) a departure for concealment was unwarranted because the tax evasion offense provided for a two level increase if the defendant failed to report income exceeding $10,000 in any year derived from criminal activity, U.S.S.G. § 2T1.1(b)(1); 2) the duration of the offense was not sufficiently unusual to warrant departure because the Guidelines contemplate conduct extending over prolonged periods and provide for level adjustment for "more than minimal planning," U.S.S.G. §§ 2B1.1(b)(4), 2F1.1(b)(2)(A), 1B1.1, note 1(f); 3) the offense did not cause a significant disruption of any governmental function because the money was taken from an unused travel fund and there was no evidence that any governmental operation was affected, much less significantly disrupted, by the thefts; 4) even if some departure was appropriate, it should have been minimal because the departure factors at issue are not substantial oversights and severe departure does not comply with the purposes of punishment endorsed by Congress and the Sentencing Commission, 18 U.S.C. § 3553(a) (1988);

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Finally, Burns' right to appeal his sentence does not remedy the district court's failure to allow defense counsel to comment upon the upward departure prior to sentencing. It is true that Burns raised on appeal the arguments he claims should have been made in the district court. The two fora, however, are quite different – the district court imposed sentence, and the appeals court reviewed that decision. An appellate court may only vacate a decision to depart from the Guidelines if it determines that the departure is "unreasonable." 18 U.S.C. § 3742(f)(2) (1988). Although review may proceed slightly differently in any given circuit,[21] the majority

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and 5) any doubt about departure should be resolved in Burns' favor because departures should not be routine and "judicially-created" departures should be "highly unusual." U.S.S.G., ch. 1, pt. A.4(b). The district judge here may have been unaware of the unusual nature of departures because she indicated that she had departed from the Guidelines "many" times. (J.A. 62).

[21] Some variation exists in the language and structure of analysis used by the courts of appeal to review upward departure. Generally, the analysis focuses on whether: 1) the grounds for departure were permissible; 2) sufficient facts underlie permissible grounds; and 3) the amount of the departure was reasonable. *See, e.g., United States v. Shuman*, 902 F.2d 873, 875-76 (11th Cir. 1990); *United States v. Lang*, 898 F.2d 1378, 1379-80 (8th Cir. 1990); *United States v. Lira-Barraza*, 897 F.2d 981, 983 (9th Cir. 1990); *United States v. White*, 893 F.2d 276, 277-78 (10th Cir. 1990); *United States v. Joan*, 883 F.2d 491, 494 (6th Cir. 1989); *United States v. Daughtrey*, 874 F.2d 213, 218 (4th Cir. 1989); *United States v. Miller*, 874 F.2d 466, 471 (7th Cir. 1989); *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989); *United States v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir.), *cert. denied*, 109 S. Ct. 3257 (1989); *United States v. Uca*, 867 F.2d 783, 786 (3d Cir. 1989); *United States v. Correa-Vargas*, 860 F.2d 35, 36-37 (2d Cir. 1988).

view is that the reasonableness standard involves a high degree of deference to the trial court.[22] The court of appeals below conducted plenary review to determine whether a factor was "adequately considered" by the Sentencing Commission. (J.A. 78). Once the court determined that a factor was a "legally permissible basis for departure," the court gave broad deference to the district court's determination that departure was "appropriate," *id.*; the degree of departure was reviewed only to see if the sentence was "arbitrary and capricious." (J.A. 83). That Burns was unable to convince the court of appeals that the departure was unreasonable is no gauge of whether these same arguments might have persuaded the sentencing court to exercise its discretion in a more favorable manner.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, and the case should be

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[22] *See United States v. McCrary*, 887 F.2d 485, 488 (4th Cir. 1989) (where a departure decision is challenged essentially on factual grounds, review "necessarily takes on the quality of the 'clearly erroneous' standard"); *Joan*, 883 F.2d at 496 ("Necessarily, the trial judge's determination must be given great deference, and, unless there is little or no basis for the trial court's action in departing, it must be upheld . . . . "); *Diaz-Villafane*, 874 F.2d at 50 (the court of appeals will not lightly disturb decisions to depart or related decisions implicating degrees of departure); *Correa-Vargas*, 860 F.2d at 40 (allowing district courts "sensible flexibility" in exercising their sound judgment to depart from Guidelines).

remanded for resentencing in conformity with Rule 32(a)(1) and procedural due process.

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APPENDIX

U.S. Const. amend. V

"No person shall . . . be deprived of life, liberty, or property, without due process of law"

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18 U.S.C. § 3553 (1988)

Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care,

or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. – The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official

commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

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18 U.S.C. § 3742 (1988)

Review of a sentence

(a) Appeal by a defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government. – The Government, with the personal approval of the Attorney General or Solicitor General, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

* * *

(e) Consideration. – Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside of the applicable guideline range, and is unreasonable, having regard for –

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guidelines and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and disposition. – If the court of appeals determines that the sentence –

* * *

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

* * *

Federal Rules of Criminal Procedure – Rule 32 (1982)

Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.

* * *

Federal Rules Of Criminal Procedure – Rule 32 (1988)

Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the

attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also –

(A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who in [sic] unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) When Made. A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.

Except with the written consent of the defendant, the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(2) **Report.** The report of the presentence investigation shall contain –

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant.

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an

explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a non-argumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of non-prison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(3) Disclosure.

(A) At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions, which if disclosed, might

seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part

thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

* * *

SENTENCING GUIDELINES

CHAPTER ONE – INTRODUCTION AND GENERAL APPLICATION PRINCIPLES

PART A – INTRODUCTION

* * *

3. The Basic Approach (Policy Statement)

* * *

Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

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4. **The Guidelines' Resolution of Major Issues (Policy Statement)**

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(b) Departures.

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The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

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§1B1.1. Application Instructions

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Commentary

Application Notes:

1. *The following are definitions of terms that are used frequently in the guidelines:*

* * *

(f) "More than minimal planning" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense.

"More than minimal planning" is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.

* * *

In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.

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§2B1.1. Larceny, Embezzlement, and Other Forms of Theft

* * *

(b) Specific Offense Characteristics

* * *

(4) If the offense involved more than minimal planning, increase by 2 levels.

* * *

Commentary

* * *

Background:

* * *

The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.

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§2F1.1. Fraud and Deceit

* * *

(b) Specific Offense Characteristics

* * *

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

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§2T1.1. Tax Evasion

* * *

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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§4A1.3. Adequacy of Criminal History Category (Policy Statement)

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range.

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A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes.

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§5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (*e.g.*, as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a

weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in §1B1.3.

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§6A1.3. Resolution of Disputed Factors *

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at

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* Ed. – Effective November 1, 1989, §6A1.3 was designated as a policy statement. *See* United States Sentencing Commission, *Guidelines Manual*, Appendix C, amendment 294 (West 1990).

trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1). Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

Commentary

In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must

determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F.Supp. 751 (D.C. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971).

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.
